IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1383 of 1995
With
FIRST APPEAL No. 1382 of 1995
With
FIRST APPEAL No. 1384 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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UNITED INDIA INSURANCE COMPANYLIMITED - Appellant(s)
Versus
DIWALIBEN KHUMAJI THAKORE & 3 - Defendant(s)

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Appearance :

MS AMEE YAJNIK for Appellant(s) : 1,
None for Defendant(s) : 1,
SERVED BY AFFIX.(N) for Defendant(s) : 2,
NOTICE UNSERVED for Defendant(s) : 3,
MR ARUN H MEHTA for Defendant(s) : 4,
MR KK NAIR for Defendant(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 02/04/2007

ORAL JUDGMENT

1. The short facts of the case are that on 24.07.1985 at about 11.30 p.m. original claimants were

travelling in Jeep No. GRW- 9738 which had proceeded on road leading for Khimana to Nanota. When the said vehicle reached near S.T. Stand of village Khoda near village Khimana, one Station Wagon No. GJD- 6474 was coming from the opposite direction and due to a rash and negligent driving of both the drivers of the concerned vehicles, the accident had occurred. As a result of the accident, Jeep No. GRO- 9738 was over turned on the side of the road and the claimants sustained injuries. The claim petitions were filed being Nos. 247 of 1985, 248 of 1985 and 249 of 1985. The learned tribunal ultimately passed the judgement and the award dated 27.08.1993 whereby the claim petition No. 247 of 1985 was allowed, claim petition no. 248 of 1985 was partly allowed and claim petition no. 249 was allowed resulting into the compensation of Rs. 15,000/-, 12,000/- and Rs. 1,00,000/- with interest and costs etc. as per the judgement of the tribunal. The present first Appeal No. 1382 of 1995 is preferred against the award passed in claim petition no. 247 of 1985 whereas First Appeal No. 1383 of 1995 is preferred against the award passed in claim petition no. 248 of 1985 and First Appeal No. 1384 of 1985 is preferred against the award passed in claim

petition no. 249 of 1985 by the Insurance Company who was alleged as having insured the vehicle no. GJD-6474.

2. Heard. Ms. Yagnik with Mr. Amin learned advocate for the appellant, Mr. Soni, Learned Advocate for the original claimant in First Appeal No. 1384 of 1985. The learned counsel for the appellant has prayed deletion of the owner of other vehicle i.e. Jeep being No. GRW- 9738, and the said prayer has been granted on the ground that the appellant Insurance Company is not concerned with the other vehicle or the insurance thereof to the extent of the liability fastened by the tribunal. However, other respondents are served but nobody has appeared on their behalf. I have also heard Mr. Nair, Learned Advocate for the respondent no. 4 in all matters. Considered the record and proceedings of the concerned claim petition.

3. It has been contended on behalf of the appellant that the vehicle No. GJD-6474 which was said to be insured by the appellant, was involved in the accident, but, the basis in the order of the tribunal was as if a case of renewal of the policy on

25.07.1985, whereas it was not a case of renewal, but it was the case of fresh policy. It has been therefore, submitted that it is an admitted position that an accident had occurred on 24.07.1985 at about 11.30 p.m. and on that day as there was no policy in existence. Since the vehicle was not insured, the tribunal has wrongly held the appellant as liable for the compensation being the Insurance Company of the vehicle.

4. Whereas Mr. Soni appearing in F.A. No. 1384 of 1995 for the original claimant contended that the Insurance Company did not appear inspite of the intimation given. Further, no evidence was produced by the Insurance Company and therefore Tribunal had to proceed on the basis of the material produced on behalf of the claimant and the finding of the Tribunal is that cover note/receipt shows that it was a case of renewal. Therefore it has been submitted that the award passed by the Tribunal is justified. Mr. Soni, further contended that in the event this court finds that vehicle was not insured on the date of accident, there is joint and several liability of the owner of the said vehicle as well as other Insurance Company

and the owner of the other vehicle, and therefore, claimant may be at liberty to recover the amount from the other Insurance Company or concerned owners of both the vehicles.

5. Mr. KK Nair learned counsel appearing for the opponent no. 4 Insurance Company contended that the tribunal in the judgement and the award itself fasten the liability of 50% to each of the Insurance Company based on the principle of tort feasors and respondent no. 4 Insurance Company has satisfied its liability by depositing full amount as ordered by the tribunal. Therefore, even if it is found that the other vehicle which is said to have been insured by the appellant, was not insured and the liability of the appellant Insurance Company is not held, then also the original claimant cannot recover amount from the respondent no. 4 Insurance Company exceeding 50%, since such was not ordered by the tribunal. Therefore, he has submitted that the prayer of the original claimant to that extent may not be accepted by this court.

6. It appears from the judgement of the tribunal, more particularly discussion on issue no. 3 at para

15, that the tribunal was mainly guided by the circumstances that sufficient opportunities were given to the Insurance Company, but the Insurance Company was not present. Further the Tribunal had considered the documents at exh. 80 and had found that in the said receipt/cover note, the renewal number of the policy was mentioned. The tribunal also considered that in the police statement the policy number was also mentioned and therefore the tribunal concluded that vehicle no. GJD 6474 was insured with the appellate Insurance Company opponent therein, appellate herein at the material time.

7. On perusal of the original record and proceedings more particularly documents at exh. 80, shows that there are two items at seriatim being policy number and renewal ANDT number writing against both the columns as PFL no. 60401/22/1/596/85, the period is specified in the policy from 25.07.1985 to 24.07.1986. The same is dated 25.07.1985, the said numbers mentioned is of policy and not of renewal ANDT number. The aforesaid appears to be an error committed on the part of the tribunal in treating the case as that of renewal of the insurance whereas expressly the policy

number was mentioned.

8. Further it is true that on behalf of the Insurance Company no evidence was led to the effect of the policy, however if the contentions of the original claimants was to be accepted by the tribunal that it was case of renewal of the policy, then in that case the tribunal ought to have relied upon any other documents of earlier policy. It is admitted position that the original claimants did not take steps for production of the original policy pertaining to the past period. The tribunal has not proceeded on the basis of the adverse inference but has proceeded on the basis of receipt/cover note which was for the policy and not for the renewal. If the said document at exh. 80 is treated as that for the policy, and not for the renewal of the earlier policy, resultant effect would be that on the date when the accident had occurred the vehicle no. GJD 6474 was not insured with the appellant Insurance Company. Under such circumstances since admittedly date of the accident is 24.07.1985. the finding of the tribunal that vehicle no. GJD 6474 was insured on the date of accident cannot be sustained and deserves to be set aside.

9. In view of the observation made herein above vehicle no. GJD 6474 was not insured on the date of accident, no liability could be held of the Insurance Company by the tribunal and consequently the judgement and award passed by the tribunal so far as it relates to the policy of the vehicle No. GJD 6474 deserves to be quashed and set aside.

10. It is true that there is liability of all the owners of the vehicles, drivers the Insurance Company and to say in other words tort-feasors is joint and several but in the present case the tribunal at para 17 has observed as under:

> **“ Under the provisions of law, all the joint-tort faesors are jointly and severally liable of the trotuous act of the drivers. However, for the sake of convenience and in order to avoid future compliacations and litigation between the parties, ratio can be apportioned amongst them by the Tribunal. Therefore, in the interest of justice and as discussed above, ratio is apportioned between them. Both the drivers are held contributory negligent at the ratio of 50% each and therefore, the opponent no. 1 and 2**

> **are labile for 50 per cent amount of compensation while the opponent nos. 3 and 4 are also liable for the remaining 50 percent amount of compensation jointly and severally.”**

11. Therefore tribunal has examined contributory negligence and has apportioned liability qua the concerned tort-feasors. Had it been a case of no clear apportionment of liability or of no clear tort-feasors found by the tribunal, it might stand on a different footing. But in the present case, the express findings were recorded by the trial court and the award was passed thereon. The original claimant has preferred neither any cross-objection to the present appeal, nor challenged order of the tribunal before any higher forum. Under the circumstances, the contention of Mr. Soni, learned counsel for the original claimant cannot be accepted for observing that even if appellant is found as not responsible or liable, the original claimant can recover an amount of compensation from the owner of the other vehicle No. GRW 9738 or Insurance Company of the said vehicle. Reference may be made to recent decision of the Honble Supreme Court in the case of ***B.S.R.T.C v. Ranjana***

Mahiji and others reported in 2006(7) SCALE page 188 more particularly observation made at para 9 in the said decision of the Apex Court. However, it is clarified that so far as the owner of the vehicle No. GJD 6474 is concerned, original claimant may have the liberty to execute award, since otherwise also, the tribunal has found as joint and several liability of the owner with the appellant Insurance Company.

12. Mr. Soni learned counsel appearing for the original claimant attempted to distinguish said judgement of the Apex Court in case of ***G.S.R.T.C. v. Ranjana Mahiji (supra)*** by contending that in the said decision High Court had directed for fastening liability to the other Insurance Company, then as per the award of the tribunal, which is not the facts situation of the present case, because in his submission, tribunal has already held the liability as joint and several and therefore the said decision of the apex court may not be applied to the facts of the present case. In my view, the tribunal after holding joint and several liability, has proceeded to further examine the question of contributory negligence for apportionment of the liability. Therefore, if the

contention as sought to be canvased on behalf of the original claimant, is accepted, then the net effect would be the same as was not found proper by Apex Court in the above referred case. Hence such attempt on the part of Mr. Soni fails.

13. In view of the above, the impugned judgement and the award of the tribunal in M.A.C.P. No. 247, 248 and 249 of 1985 so far as they relates to fastening of the liability upon the appellant Insurance Company are quashed and set aside. Appeals allowed to the aforesaid extent. Insurance Company shall be at liberty to withdraw the amount from the tribunal which was deposited pursuant to the interim ordered passed by this court in the proceedings of the present appeals. Considering facts and circumstances, there shall be no order as to costs. Decree accordingly. R & P be returned to the tribunal.

(JAYANT PATEL,J.)

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